

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

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(240) 777-6600

**Case No. A-6441**

**PETITION OF GRACE E. MIAZZA**

**OPINION OF THE BOARD**

(Opinion Adopted September 17, 2014)  
(Effective Date of Opinion: October 17, 2014)

Case No. A-6441 is an application for a variance to allow installation of solar panels, which are considered an accessory structure, in the front yard. Section 59-C-1.326(a) requires that accessory structures be located in the rear yard.

The Board of Appeals held a hearing on the application on September 17, 2014. Grace Miazza appeared and testified. Mike Ryan, of Aurora Energy, also testified. Robert Mueller, who lives at 75 Bryants Nursery Road, also testified. The record contains a letter of opposition from Richard L. Kalb of 100 Bryants Nursery Road.

Decision of the Board:                      Variance Granted.

**EVIDENCE PRESENTED**

1. The subject property is Lot 2, Block A, Brinkerhoff Tract Subdivision, located at 55 Bryants Nursery Road, Silver Spring, Maryland, 20905, in the RE-2 Zone.
2. Michael Ryan, representing the company that installed the solar panels, testified that "We went through all the necessary steps to get a permit." [Transcript, p. 12]. He stated that the Well and Septic Division required that the panels be located closer to the street than originally proposed to accommodate the potential need for a septic field. Mr. Ryan testified that the location of the panels is the only feasible one on the property to achieve sufficient solar access. He testified that

after the panels were installed, there were three county inspections, none of which revealed a zoning violation.

3. Ms. Miazza testified that she had her solar panels installed in accordance with a permit that she received from the Department of Permitting Services. In her Statement, [Exhibit No. 3], and in her testimony, referring to Exhibit Nos. 7(c) and 4(a), she testified that she has a pie-shaped lot that slopes up from front to back and that her house is "sited toward the rear of the parcel" with the result that she has "little space in the backyard." She testified that the buildable area behind her house has many trees, and that even if they were removed to install the solar panels, the location would not receive "any significant amount of solar access." [Transcript, September 17, 2014, p. 6]. In response to Board questions, Ms. Miazza testified that the sun rises behind her house and sets toward the front of her house, so the solar panels are oriented to face the house. Ms. Miazza also testified that she considered installing the solar panels on the roof of her house, but that three contractors told her that there would not be sufficient solar access on the roof, either.

Ms. Miazza stated that it was always her intent to plant arborvitae to screen the solar array. [Transcript, p. 32].

4. Ms. Miazza testified that she has a severely disabled young adult in her household who relies on medical equipment that must operate at all times. Ms. Miazza stated that this individual is subject to uncontrolled asthma. Ms. Miazza testified that she has relied on generators in the past to operate the medical equipment during power outages, but that the exhaust from the generators has aggravated this individual's asthma. Ms. Miazza says that she intends to use the solar panels as a back-up source of power to keep this medical equipment operating, and that the use of solar panels for power would not aggravate this individual's condition.

5. Mr. Mueller stated that he is the abutting neighbor to the east. He stated that the panels are visible from his entire driveway and from his house. He stated that the solar panels are an eyesore that doesn't belong in the front yard of a residential neighborhood. He asked that the variance not be approved. He suggested that the County, having mistakenly issued a permit for the solar panels, should remove the panels and make reparations to Ms. Miazza. In the alternative Mr. Mueller recommended a privacy fence around the panels, which, he suggested, would also likely need a variance. Mr. Mueller also suggested that the panels be screened with mature evergreen trees. Mr. Mueller acknowledged that he is aware that a person with severe disabilities resides at the subject property, but expressed his view that the solar array is not currently providing back-up power for her equipment and that a second power line could provide back up power in emergencies.

## CONCLUSIONS OF LAW

1. A variance permits a structure that otherwise would not be permitted by the zoning ordinance, which has led the Maryland Court of Special Appeals to clarify that "the authority to grant a variance should be exercised sparingly and only under exceptional circumstances," *Cromwell v. Ward*, 102 Md. App. 691, 703, 651 A.2d 424, 430 (1995) (citation omitted). Review of a variance application under an ordinance like Montgomery County's involves a two-step process to discern a unique characteristic of the property and then to determine whether a practical difficulty results from the uniqueness of the property:

The first step requires a finding that the property whereon structures are to be placed (or uses conducted) is -- in and of itself -- unique and unusual in a manner different from the nature of the surrounding properties such that the uniqueness and peculiarity of the subject property causes the zoning provision to impact disproportionately upon that property. Unless there is a finding that the property is unique, unusual, or different, the process stops here and the variance is denied without any consideration of practical difficulty or unreasonable hardship. If that first step results in a supportable finding of uniqueness or unusualness, then a second step is taken in the process, i.e. a determination of whether practical difficulty and/or unreasonable hardship, resulting from the disproportionate impact of the ordinance caused by the property's uniqueness, exists.

*Cromwell*, 102 Md. App. at 694-695, 651 A.2d at 426. That the variance might allow an improvement to property that is "suitable or desirable or could do no harm or would be convenient or profitable to its owner" does not provide a basis for granting a variance. *Cromwell*, 102 Md. App. at 707, 651 A.2d at 432. The need for the variance must arise from the application of the zoning ordinance to the unique or peculiar characteristics of the property. See *Cromwell*, 102 Md. App. at 717-718, 651 A.2d at 437. The zoning ordinance must impact upon the land in a unique manner that does not exist where a restriction applies "equally to all lots of similar size." *Cromwell*, 102 Md. App. at 720, 651 A.2d at 438.

2. In *Salisbury Board of Zoning Appeals v. Bounds*, 240 Md. 547, 554-55, 214 A.2d 810, 814 (1965), the Maryland Court of Appeals agreed with 2 Rathkopf, The Law of Zoning and Planning, 48-1, that,

If the peculiar circumstances which render the property incapable of being used in accordance with the restrictions contained in the ordinance have been themselves caused or created by the property owner or his predecessor in title, the essential basis of a variance, i.e., that the hardship be caused solely through the manner of operation of the ordinance upon the particular property, is lacking. In such a case, a variance will not be

granted; the hardship, arising as a result of the act of the owner or his predecessor, will be regarded as having been self created, barring relief.

3. Section 59-G-3.1 of the Montgomery County Zoning Ordinance ("Authority – Board of Appeals") provides that the Board of Appeals may grant petitions for variances, as authorized in Section 59-A-4.11(b), upon proof by a preponderance of the evidence that:

- (a) By reason of exceptional narrowness, shallowness, shape, topographical conditions or other extraordinary situations or conditions peculiar to a specific parcel of property, the strict application of these regulations would result in peculiar or unusual practical difficulties to, or exceptional or undue hardship upon, the owner of such property;

4. It is under the first subsection that the Board must employ the analysis from the *Cromwell* case, set forth above. The Board finds that the application does not meet the requirement of uniqueness under the ordinance. The Board finds that the difficulty in locating the solar array in the backyard is primarily due to the location of the house at the back of the lot, which is a self-imposed hardship under the law, and cannot be a basis to grant a variance. Thus, the application fails to meet the requirements of Section 59-G-3.1(a).

5. Because the application does not meet the threshold requirements of Section 59-G-3.1(a), the Board did not consider its conformance with subsections (b)-(d).

#### Standards for Evaluation of a Variance on ADA/FHAA Grounds

6. A variance can be granted as a reasonable accommodation of a petitioner's disability under Title II of the Americans With Disabilities Act (ADA), as amended by the ADA Amendments Act of 2008 (ADAAA), and the Fair Housing Amendments Act of 1988 (FHAA).

The ADAAA and FHAA define a disability, or handicap as "a physical or mental impairment that substantially limits one or more of the major life activities of (an) individual." 42 U.S.C.A. §12102(1)(A); 42 U.S.C. §3602(h).

#### Prohibition on Housing Discrimination Based on Disability

7. The FHAA and Title II of the ADA prohibit housing discrimination based on an individual's handicap or disability.

The FHAA prohibits discrimination against "any person in the terms, conditions or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling" on the basis of that person's handicap. 42 U.S.C.A. § 3604(f)(2). The FHAA definition of discrimination includes a refusal to make reasonable accommodation in "rules, policies, practices

or services when such accommodation may be necessary to afford" a person with a handicap "equal opportunity to use and enjoy a dwelling." 42 U.S.C.A. § 3604(f)(3)(B). A "necessary accommodation" to afford "equal opportunity" under FHAA will be shown where, but for the accommodation, the disabled person seeking the accommodation "will be denied an equal opportunity to enjoy the housing of their choice." *Trovato v. City of Manchester, N.H.*, 992 F.Supp. 493, 497 (D.N.H. 1997) (citing *Smith & Lee Assocs. v. City of Taylor*, 102 F.3d 781, 795 (6th Cir. 1996)). The failure to provide reasonable accommodation need not be supported by a showing of discriminatory intent. [See *Trovato*, 992 F. Supp. at 497 (citing *Smith*, 102 F.3d at 794-96).]

8. The "reasonable accommodation" provision of the FHAA has been interpreted to require municipalities to "change, waive, or make exceptions in their zoning rules to afford people with disabilities the same opportunity to housing as those who are without disabilities." *Trovato*, 992 F. Supp. at 497 (citing *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1103 (3rd Cir. 1996)). Similarly, Title II of the ADA (42 U.S.C.A. §12132) has been held to apply to zoning decisions, which constitute an "activity" of a public entity within the meaning of the ADA. [See, *Mastandrea v. North*, 361 Md. 107, 126, 760 A.2d 677, 687, at n. 16 (citing *Trovato*, 992 F.Supp. at 497).]

9. The Board finds that there is uncontroverted testimony that there is a resident in the home with physical impairments that require constant use of supportive medical equipment. The Board further finds that these impairments substantially limit one or more of the major life activities of this individual and constitute a disability under the ADAAA and FHAA.

10. The Board further finds that allowing the solar panels to provide a back-up source of power for the medical equipment is a reasonable accommodation to allow the disabled individual to safely live in the home. The Board notes testimony that unlike generators, solar power would not exacerbate the disabled individual's condition. The Board acknowledges that the solar panels are not currently connected to back-up batteries, but believes the Applicant's assertion that she intends to pursue that measure, noting that it is not unusual for such installations to take place in stages.

Therefore, on a motion by David K. Perdue, then Vice-Chair, seconded by Stanley B. Boyd, with Carolyn J. Shawaker, John H. Pentecost and Catherine G. Titus, then Chair, in agreement, the Board grants the requested variance subject to the following condition:

1. The Applicant shall install screening vegetation at a minimum height at planting of three feet, sufficient to screen the array from the street and from adjoining properties.

The Board adopted the following Resolution:

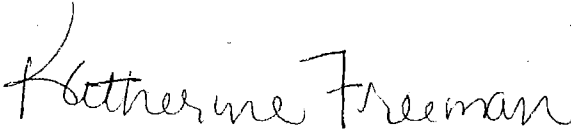
**BE IT RESOLVED** by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.



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David K. Perdue  
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 17<sup>th</sup> day of October, 2014.



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Katherine Freeman  
Executive Director

**NOTE:**

See Section 59-A-4.53 of the Zoning Ordinance regarding the twelve (12) month period within which the variance granted by the Board must be exercised.

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.